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Sec. 2 11

Sec. 10 ..... 6, 7, 11

Sec. 11 12

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 724

SUBURBAN LUMBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (P. A. 130–142)[1] is reported in 121 F. (2d) 829. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 2–16) are reported in 3 N. L. R. B. 194.

[1] Pursuant to stipulation of the parties (P. A. 145–146), the printed record for purposes of the petition for certiorari consists of the appendix to the Board's brief in the court below, referred to herein as (B. A.); and the appendix to the Company's brief and the proceedings in the court below, together referred to herein as (P. A.).

JURISDICTION

The decree of the court below (P. A. 142–144) was entered on September 10, 1941. The petition for a writ of certiorari was filed on October 31, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the court below was without jurisdiction to enforce the Board's order because of variances between (a) the Board's "Decision" and the copy thereof served upon petitioner, and (b) the Board's "Decision" and the copy thereof certified and filed by the Board in the court below.

2. Whether the National Labor Relations Act applies to a company engaged in the sale of lumber, building materials, and coal within New Jersey, which receives substantially all of its materials, of the annual value of more than $143,000, from out-of-state sources, and whose seven truck drivers spend 16 percent of their time in transporting materials across state lines to the company's premises.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix, *infra*, pp. 11–13.

STATEMENT

Upon the usual proceedings, the Board, on August 2, 1937, issued its findings of fact, conclusions of law, and order embodied, in accordance with its then uniform Board practice, in a typewritten document entitled "Decision" (B. A. 2–16). The Board found that petitioner had engaged in certain unfair labor practices affecting commerce, and directed that petitioner cease and desist therefrom and take certain affirmative remedial action (B. A. 2–16). Neither the findings concerning unfair labor practices nor the appropriateness of the order are challenged in this Court. The jurisdictional findings may be summarized as follows:[2]

Petitioner operates a retail lumber, building material, and coal yard at Oaklyn, New Jersey, where it employs three office workers and ten or eleven workmen, seven of whom are engaged in driving trucks (B. A. 4; B. A. 17–18, 29–30, 44, 79). Almost all of petitioner's sales, which in 1936 amounted to approximately $200,000, are made in New Jersey; almost all of petitioner's purchases, which in the fiscal year ending November 30, 1936, amounted to more than $143,000, are shipped to petitioner from points outside New Jersey (B. A. 4–5; B. A. 22–25, 36). Petitioner receives the bulk of these out-of-state purchases

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

by rail on its own siding, and a further substantial portion by steamer at docks in Philadelphia, Pennsylvania, and Camden, New Jersey, from where it is delivered to petitioner's yard by railroad, trucks hired by the seller, or petitioner's own trucks (B. A. 4–5; B. A. 23–25). Approximately 16 percent of the time of petitioner's truck drivers is consumed in interstate hauling of such purchases from Philadelphia to petitioner's yard (B. A. 4; B. A. 26, 49–50, 71, 74–75, 79, 88).

On the day that the Board issued and filed its original typewritten "Decision" (B. A. 2–16), it served upon petitioner a carbon copy thereof (P. A. 109–124) with a covering letter stating that "a copy of the Board's Decision" was enclosed (P. A. 109). The copy of the "Decision" was identical with the original except only that the date line was omitted and the lines upon which the signatures of the Board members appear were blank (P. A. 124).[3]

On June 15, 1940, the Board filed in the court below a petition for enforcement of its order (P. A. 99–102), and concurrently certified and filed in the court below a transcript of the entire record in the proceeding, including a printed copy of its said "Decision" containing its findings of fact, conclusions of law, and order. The printed copy, however, differs from the typewritten orig-

[3] As the court below pointed out (P. A. 139), petitioner addressed no inquiries to the Board to resolve the doubts, if any, it may have entertained concerning the document served upon it.

inal "Decision" in that (1) the first page of the printed copy adds a headnote and the date of the decision; and (2) the last page of the printed copy adds the words "Chairman Madden took no part in the consideration of the above Decision and Order," and omits the following words which appear at the end of the typewritten original (compare B. A. 2, 16, with P. A. 1, 3):

> Signed at Washington, D. C. this 2nd day of August 1937.
>
> [s] DONALD WAKEFIELD SMITH,
> *Member,*
>
> [s] EDWIN S. SMITH,
> *Member,*
> *National Labor Relations Board.*[4]

Petitioner filed an answer (P. A. 102–105) requesting denial of the Board's petition for enforcement, and thereafter moved the court (P. A. 105–124) for leave to file as part of the record in the case, the copy of the "Decision" which the Board had served upon it (*supra,* p. 4). The court denied the motion (P. A. 128–129).

On June 30, 1941, the court below, sitting *en banc* (P. A. 129–130),[5] handed down its opinion

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[4] It is the Board's practice, in enforcement and review proceedings in the circuit courts of appeals, to certify whenever possible a printed copy of the Board's decision as prepared by the Government Printing Office for inclusion in the Board's official reports, rather than a typewritten copy. This practice eliminates the necessity of retyping copies for purposes of certification.

[5] Petitioner does not raise the question whether a circuit court of appeals may be composed of all the circuit judges in

(P. A. 130–142), and on September 10, 1941, entered its decree (P. A. 142–144), enforcing the Board's order with a modification not here material.

ARGUMENT

1. There is no basis for petitioner's contentions (Pet. 2–3, 4, 5–6, 7–13) that the minor and immaterial variances (a) between the Board's original "Decision" and the carbon copy served upon petitioner, and (b) between the Board's original "Decision" and the printed copy certified by the Board in the court below as part of the transcript of record (*supra,* pp. 4–5), deprived the court below of jurisdiction to enforce the Board's order. Petitioner does not contend that it was misled or prejudiced by the variances; in any event, as the court below noted, "If respondent's [petitioner's] counsel had any doubts about the paper served on him, he knew the address of the office where a practical man could have these doubts resolved" (P. A. 139). These clerical and nonprejudical variances were clearly not jurisdictional defects; Congress, in providing for service of a copy of the Board's order upon

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active service, sitting *en banc*. That question is now before this Court in *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, No. 34, this Term, argued and awaiting decision. It has also been raised in *Oughton* v. *National Labor Relations Board*, No. 98, this Term, pending on petition for certiorari, and *Newark Morning Ledger Co.* v. *National Labor Relations Board*, No. 307, this Term, pending on petition for certiorari.

the affected person (Sections 10 (c), 11 (4)), and for certification and filing of a transcript of the record in the reviewing court (Sections 10 (e), 10 (f)), did not mean to withhold effective protection from interstate commerce by making an insubstantial deviation from exact reproduction a jurisdictional bar to enforcement.[6]

2. Petitioner's further contention (Pet. 3, 4–5, 6, 16–24) that the Act may not be applied to petitioner's operations is without merit, as the court below correctly held (P. A. 130–138). A clear basis for application of the Act to petitioner's enterprise rests on its receipt in interstate commerce of lumber, materials, and supplies exceeding $143,000 in value each year, and constituting almost all of petitioner's total purchases. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 54; *Local 167, International Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 297. The circuit courts of appeals have uniformly held, in cases arising under the National Labor Relations Act, that the threat of obstruction to a flow of interstate commerce by labor

[6] Moreover, it is by no means clear that there were variances in the document required by the Act to be served. While the copy of the Board's "Decision" served on petitioner deviated from the original "Decision" in the respects noted (*supra,* p. 4), Section 10 (c) requires service only of the Board's order, not of its "Decision," and the Board's order contained in the original "Decision" (B. A. 15–16) was reproduced exactly in the copy of the "Decision" served upon petitioner (P. A. 122–124).

disputes arising in the state of destination warrants application of the Act.[7] There are no contrary decisions. And that petitioner's enterprise is small does not of itself immunize it from the Act. Cf. *United States* v. *Darby,* 312 U. S. 100, 123; *National Labor Relations Board* v. *White Swan Co.,* 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, No. 279, this Term.[8]

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[7] *National Labor Relations Board* v. *Western Massachusetts Electric Co.*, 120 F. (2d) 455, 456–457 (C. C. A. 1); *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), modified and affirmed, 308 U. S. 241; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951, 955 (C. C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 115 F. (2d) 414, 416 (C. C. A. 4), certiorari granted with respect to other points and now awaiting decision, Nos. 25, 26, this Term; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 40–41 (C. C. A. 6); *Wilson & Co.* v. *National Labor Relations Board*, decided November 17, 1941 (C. C. A. 7); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9), certiorari denied, 312 U. S. 678; *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543 (C. C. A. 10).

[8] While proof of actual obstruction to interstate commerce is unnecessary since the Act exercises a preventive power (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 204, 222; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 326), it is noteworthy that petitioner's unfair labor practices in the instant case caused picketing which resulted in out-of-state drivers refusing to deliver materials to petitioner and returning to their state of origin (R. A. 93, 54–55).

Petitioner's contention (Pet. 19, 22–23) that this proper basis of jurisdiction[9] should be defeated in the instant case through application of the maxim *de minimis* is untenable. As the court below pointed out, "De minimis in the law has always been taken to mean trifles * * *" (B. A. 135). $143,000 of materials imported by petitioner annually and constituting almost 100 percent of its total purchases are far more than trifling—they "surely cannot be considered in the category of de minimis" (P. A. 135). Cf. *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, No. 279, this Term.

A further basis for application of the Act to petitioner's operations rests upon the fact that petitioner's truck drivers spend an appreciable portion of their time in direct hauling of materials across state lines (*supra*, p. 4). This traffic in which petitioner directly engages clearly constitutes interstate commerce and, since interruption or stoppage of petitioner's operations by industrial strife would burden and obstruct this interstate commerce, the Act applies to petitioner's operations.[10]

[9] Petitioner apparently concedes that out-of-state purchases may furnish a sufficient basis for application of the Act (Pet. 21).

[10] Cf. *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 263; *Washington, Virginia & Maryland Coach Co.* v. *National Labor*

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1941.

Relations Board, 301 U. S. 142, 146; *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97, 99–100 (C. C. A. 2); *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, No. 279, this Term; *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480, 482 (C. C. A. 8).